88-1462

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF
SCOTT PAPER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MARK BROOKS
(Counsel of Record)
UNITED PAPERWORKERS
INTERNATIONAL UNION
P.O. Box 1475
Nashville, TN 37202
(615) 834-8590

LAURENCE GOLD
DAVID SILBERMAN
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
STEPHEN P. SUNENBLICK
P.O. Box 7060, DTS
97 India Street
Portland, ME 04112

JAMES COPPESS
1925 K Street, N.W.
Suite 411
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30

QUESTIONS PRESENTED

1. Whether a federal court's power to vacate arbitration awards which do not "draw their essence" from the collective bargaining agreement empowers the court to overturn an arbitral decision on the ground that the court disagrees with the arbitrator's conclusion that the language of a collective bargaining agreement is open to interpretation and with the arbitrator's reliance on extrinsic evidence of the parites' intent in construing that language?

2. If the answer to the first question is "yes," what are the limits of the courts' power to vacate arbitration awards on these grounds?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
Introduction	3
The Arbitrators' Decisions	4
The Decision of the Court of Appeals in *Warren I*	7
The Decision of the Court of Appeals in *Warren II*	8
The Decision of the Court of Appeals in *Warren III*	9
REASONS FOR GRANTING WRIT	10
CONCLUSION	24

TABLE OF AUTHORITIES

CASES: Page

Arco-Polymers, Inc. v. Local 8-74, 671 F.2d 752 (3rd Cir. 1982) 14, 18
Autoworkers Local 342 v. TRW, Inc., 402 F.2d 727 (6th Cir. 1968) 13
Detroit Coil v. Machinists, 594 F.2d 575 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979) 17
Dobbs, Inc. v. Local 614 International Brotherhood of Teamsters, 813 F.2d 85 (6th Cir. 1987) 17
Ethyl Corp. v. Steelworkers, 768 F.2d 180 (7th Cir. 1985) 18
Firemen and Oilers Local 935-B v. Nestle Co., 630 F.2d 1294 (6th Cir. 1980) 13, 16
F.W. Woolworth Co. v. Miscellaneous Warehousemen, 629 F.2d 1204 (7th Cir. 1980) 15, 18
Georgia Kraft Co., 71 Lab. Arb. 222 (1978) 12
Kewanee Machinery v. Teamsters Local 21, 593 F.2d 314 (8th Cir. 1979) 15
Loveless v. Eastern Air Lines, Inc., 681 F.2d 1271 (11th Cir. 1982) 19
Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977) 13, 16
Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board, 724 F.2d 1217 (6th Cir. 1984) 13
Norfolk Shipbuilding & Drydock v. Boilermakers, Local 684, 671 F.2d 797 (4th Cir. 1982) 15
Paperworkers v. Misco, —— U.S. ——, 56 L.W. 4011 (Dec. 1, 1987) ..... *passim*
Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 11, 19, 20
Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960) 11, 12, 19, 20, 21
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) 11, 19, 20
United Inter-Mountain Telephone Co. v. Communications Workers, No. 87-5701 (6th Cir., April 25, 1988) 23
Waverly Mineral Products Co. v. Steelworkers, 633 F.2d 682 (5th Cir. 1980) 15

TABLE OF AUTHORITIES—Continued

STATUTORY PROVISIONS: Page

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) 2
Section 203(d) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 173(d) 3

MISCELLANEOUS:

Baer, *Discipline and Discharge Under The Labor Agreement* (1972) 12
Bureau of National Affairs, *Basic Patterns in Union Contracts* (11th ed. 1986) 10, 11
Comment, 18 Wake Forest L.Rev. 902 (1982) 11
Kadish, *The Criminal Law and Industrial Discipline As Sanctioning Systems*, 17 Proceedings of the National Academy of Arbitrators 125 (1964) 11
Reinhardt, *Arbitration and the Courts: Is The Honeymoon Over*, 40 Proceedings of the Annual Meeting of the National Academy of Arbitrators 25 (1987) 10
Wollett, *What An Arbitrator Looks for from Management in Discharge Cases*, 9 Emp. Rel. L.J. 525 (1984) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ———

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit in two cases entitled *S.D. Warren Company v. United Paperworkers International Union, Local No. 1069*, C.A. 1, Nos. 86-1450 and 87-1570.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the First Circuit in this matter (*Warren I*) is reported at 815 F.2d 178, and is reprinted as Appendix C, pp. 13a-32a, to the separately bound Appendix to this petition for a Writ of Certiorari ("Pet. App."). The opinion of the First Circuit upon remand from this

Court (*Warren II*) is reported at 845 F.2d 3, and is reprinted at Pet. App. A, pp. 1a-11a. The third opinion of the Court of Appeals (*Warren III*) is reported at 846 F.2d 827, and is reprinted at Pet. App. F, pp. 108a-22a. The opinion of the United States District Court for the District of Maine reviewed in *Warren I and II* is reported at 632 F. Supp. 463, and is reprinted at Pet. App. D, pp. 32a-48a. The District Court opinion reviewed in *Warren III* is unreported, and is printed at Pet. App. G, pp. 123a-26a. The award of Arbitrator Suzanne Gwiazda, which was the subject of *Warren I* and *Warren II*, is reported at 89 Lab. Arb. (BNA) 688, and is reprinted at Pet. App. E, pp. 39a-107a. The award of arbitrator Theodore Role, which was the subject of *Warren III*, is unreported, and is printed at Pet. App. H, pp. 127a-200a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit in *Warren II* was entered on April 21, 1988. The judgment of the Court of Appeals in *Warren III* was entered on May 19, 1988. On June 25, 1988, Justice Brennan signed an Order extending the time for filing a petition for writ of certiorari in both cases to and including September 18, 1988. (Pet. App. I, p. 201a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect

to the amount in controversy or without regard to the citizenship of the parties.

Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d), provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

STATEMENT OF THE CASE

Introduction

Petitioner United Paperworkers International Union, Local 1069 (the "Union") and respondent S.D. Warren Co. (the "Company") were, at all times relevant herein, parties to a collective bargaining agreement covering the production and maintenance employees at the Company's paper mill in Westbrook, Maine. Under that agreement, the Company has the right to discharge employees only for "proper cause." Appended to the agreement, and incorporated therein, is Mill Rule 7 which lists thirteen "causes for discharge," including such offenses as "disorderly conduct," "deliberate waste of Company time," and "Smoking upon Company's premises except in authorized smoking areas."

On February 15, 1984, the Company discharged nine employees on the ground that each employee had possessed, used or sold marijuana or alcohol on Company premises, an offense proscribed by subsection (a) of Mill Rule 7. The Union filed a grievance over each discharge alleging that the Company lacked proper cause for the discharge. Under the auspices of the American Arbitration Association, the parties selected two arbitrators to render final and binding decisions on the Union's grievances: Arbitrator Suzanne Gwiazda was selected to decide the grievances concerning employees Denis, Graham, Willoughby

and Buhelt, and Arbitrator Theodore Role was selected to decide the grievances concerning MacDonald, Anderson, Jensen, Rondeau, and Hudson.

The Arbitrators' Decisions

On September 19, 1985, following an eight-day hearing over a period of four months, and after receiving post-hearing briefs, Arbitrator Gwiazda rendered a 41 page decision and award ("the Gwiazda Award") holding that, in light of all the circumstances, the conduct of three of the four grievants, while violative of Rule 7, provided "proper cause" for lengthy suspensions (ranging from four to nine months) but *not* for discharge. In reaching this conclusion the Arbitrator reasoned as follows.

Arbitrator Gwiazda began by addressing the question of whether, as the Company contended, "once a violation of Mill Rule 7(a) is established, a discharge for violation of that rule must be upheld because of the plain meaning of the contract, past practice, bargaining history, and public policy." Pet. App. 68a. The Arbitrator rejected that contention on several grounds.

First, the Arbitrator looked to the language of the Rule and found that it is *not* "plain." The Arbitrator stated:

> Granted Section 7 of the Mill Rules is titled "Causes for Discharge," but there is no verb used. It does not say whether such causes "*will* be" or "*may* be" grounds for termination. [Pet. App. 76a; emphasis in original.]

The Arbitrator concluded that this ambiguity was "heightened" by the Company's own "Safety Policy handbook" which provided that the violation of certain rules—including Rule 7(a)—"*may* mean immediate discharge"; the Arbitrator noted that "[i]nasmuch as the safety booklet is a unilateral statement of Company policy, not a negotiated agreement with the Union, the Company had full opportunity to state that violations of [Rule

7(a)] *will* mean immediate discharge," but the Company did not do so. Pet. App. 77a (emphasis in original).

In addition to the contract language, Arbitrator Gwiazda looked to the parties' past practice to determine whether the parties intended any violation of Rule 7 to *ipso facto* constitute "proper cause" for discharge. The Arbitrator found that

> the vast majority of Rule 7 violations have been penalized with something less than immediate discharge. To be specific, other than the cases at hand, of the forty-one (41) identifiably Rule 7 violations in the record, only two (2) such violations have been penalized with immediate discharge, and both involved incarceration for serious crimes (manslaughter and incest, according to unrebutted Union testimony). [Pet. App. 78a]

The Arbitrator went on to find that some employees had received "mere verbal warnings" for Rule 7 violations (even for second offenses); "at least eight written warnings have been issued for Rule 7 violations"; "[n]o fewer than eighteen (18) suspensions . . . have been meted out for Rule 7 violations"; and "last-chance EAP [Employee Assistance Program] agreements have been given to at least six (6) employees found to be violating Rule 7 . . . two after apparently violating the rule at issue here—Rule 7(a)." Pet. App. 78a-79a.

Based on all of these considerations, the Arbitrator concluded that she was not precluded from assessing whether the penalty of discharge was "proper" in light of the conduct of the grievants. Arbitrator Gwiazda explained:

> [T]he Agreement does not "clearly" require immediate discharge, and past practice only heightens the ambiguity about what will happen to the employee who violates Mill Rule 7. Nor is there any express restriction in the Agreement limiting the Arbitrator's remedy authority. Under these conditions, it is well established that where an arbitrator is adjudi-

> cating a "proper cause" case, and he or she finds that the discharge penalty was improper because it was arbitrary, capricious, in bad faith, discriminatory, excessively or disparately harsh, or just plain unfair —he or she has the authority to fashion a lesser penalty or direct make-whole remedy as the facts of the case require. [Pet. App. 92a.]
>
> * * * *
>
> Under the proper cause provision, the Company has the right to discipline employees who violate Mill Rules, including the right to discharge where necessary, but the discipline must be reasonably even-handed to be fair or "proper." [Pet. App. 94a.]

After considering all of the surrounding circumstances with respect to the grievances' situation and their dealing with the undercover agent who had participated in the grievants' violations of Mill Rule 7(a), the Arbitrator concluded that the discharges "were excessively harsh in light of past discipliary practice for similarly serious Mill Rule 7 violations." Pet. App. 106a. The Arbitrator left the grievants with "[h]eavy suspensions" ranging from four to nine months to "impress upon the grievants the seriousness of their misconduct," but, persuaded that the grievants "fully realize this now and will return to work with the determination to be productive employees which motivated them in the first place," the Arbitrator overturned the discharges. Pet. App. 106a-107a.

After the Gwiazda Award issued, Arbitrator Role held a six-day hearing with respect to the four discharged employees whose grievances had been submitted to him rather than to Arbitrator Gwiazda. Following further briefing, on June 24, 1986, Arbitrator Role issued a 51 page decision and award to resolve those grievances. He agreed with the construction of the collective bargaining agreement enunciated in the Gwiazda Award. *See* Pet. App. 184a-185a. And like Arbitrator Gwiazda, he found that the grievants' offenses warranted suspensions but not discharges. *See* Pet. App. 198a-199.

The Decision of the Court of Appeals in *Warren I*

Following the issuance of the Gwiazda Award, the Company filed this action seeking to have that Award vacated. The District Court granted summary judgment for the Union, but the United States Court of Appeals for the First Circuit reversed. The appellate court rested its decision on two grounds: first, that "the award cannot be enforced as a matter of public policy," and second that the award "does not draw its essence from the collective bargaining agreement." Pet. App. 30a.

In reaching this latter conclusion, the court of appeals took it upon itself "to see if the contract was ambiguous," Pet. App. 24a, as the court understood the arbitrator's task to be limited to "construe[ing] ambiguous contract language,'" *id.* 20a, *quoting Detroit Coil v. Machinists*, 594 F.2d 575, 579 (6th Cir. 1979), *cert. denied*, 444 U.S. 840. The court below decided, in disagreement with the Arbitrator, that the meaning of the contract is plain: "*We disagree* that Mill Rule 7(a) was so ambiguous that it took away from the employer the exclusive right to determine the punishment to be imposed for violation of that clause." Pet. App. 17a (emphasis added). That court further concluded that the Arbitrator had misconstrued that contract: "[*W*]*e conclude* that the parties at the bargaining table had a meeting of the minds, that in cases of possession, use or sale of marijuana on company property, the employer had a right to discharge." Pet. App. 24a (emphasis added). On that basis the court of appeals decided that Arbitrator Gwiazda's "construction is not the one the parties bargained for" and that therefore the Award "does not draw its essence from the collective bargaining agreement." Pet. App. 30a-31a.

The Union petitioned this Court for a writ of certiorari to enable the Court to review the First Circuit's decision. On December 14, 1987, the Court granted the writ, vacated the judgment, and remanded the case for recon-

sideration in light of this Court's intervening decision in *Paperworkers v. Misco*, —— U.S. ——, 56 L.W. 4011 (December 1, 1987). *See* Pet. App. 12a.

The Decision of the Court of Appeals in *Warren II*

On remand, the First Circuit reaffirmed its decision in *Warren I*. The court of appeals grudgingly "assume[d] without deciding that *Misco* forecloses the alternate public policy grounds upon which we decided *Warren I*." Pet. App. 8a. But that court asserted that "*Misco* does not affect [the] basic holding" of the first decision. Pet. App. 2a.

In reaching this conclusion, the court below once again relied upon its own "uncomplicated reading" of the "plain language of the contract" to decide that the agreement "removes from the arbitrator the authority to determine a remedy once she concludes that a certain rule has been breached." Pet. App. 10a. That court justified that interpretation by constructing its own accommodation of the disparate terms of the contract:

> The parties negotiated and agreed to the remedy for violations of Rule 7(a). . . . The Rule plainly states that such a violation is "cause for discharge." The management rights clause provides that the Company "reserves the sole right to . . . discharge employees for proper cause. . . ." The Arbitrator, himself, agreed "that arbitrators generally consider synonymous the language 'proper cause,' 'just cause,' or 'cause . . . .'" [1] Therefore, the contract plainly states that the Company has the sole right to discharge employees for the violation which admittedly occurred. [Pet. App. 10a-11a.]

---

[1] The foregoing sentence is clearly in error, since no such passage appears in Arbitrator Gwiazda's award. Evidently the court had in mind a passage from Arbitrator Role's award, Pet. App. 185a, which was then under review by a different panel of the court of appeals, as discussed *infra* at 9-10. *See also Warren III*, Pet. App. 120a-121a n.6 (Coffin, C.J., concurring.)

The court of appeals added:

> In the face of the contract's unambiguous language to this effect, it cannot be said that the arbitrator even "arguably constru[ed] or appl[ied] the contract." [Pet. App. 11a, *quoting*, *Misco*, 56 L.W. at 4014.]

The Decision of the Court of Appeals in *Warren III*

While *Warren I* had been pending in the court of appeals, the Company had filed a separate action seeking to have arbitrator Role's Award vacated. Once *Warren I* was decided, the district court ruled for the Company in this second action and the Union appealed.

Following the decision in *Warren II*, a separate (but overlapping) panel of the First Circuit affirmed the district court's order vacating the Role Award. That panel based its decision on *Warren I* and *Warren II*, reasoning that "[g]iven th[e] holding in the companion case, the arbitrator's findings of Rule 7(a) violations . . . bind the Union here as well." Pet. App. 111a.

Chief Judge Coffin concurred in the judgment "because the panel opinion in the companion case . . . has become the law in this circuit and therefore controls the instant case." *Id.* 112a. But in a separate opinion he argued that *Warren I* and *II* were wrongly decided and that this Court's decision in *Misco* "requires that we affirm, rather than vacate, the arbitration awards." *Id.* Chief Judge Coffin explained:

> [G]iven the arguable ambiguity in the contract concerning the Company's right to immediately discharge employees under Mill Rule 7, the Company's past practices and other considerations specific to the plant, the arbitrators . . . *arguably* could have decided that the employees' violations of that rule were neither "causes" nor "proper causes" for discharge. I would conclude that, in both cases, the arbitrator was "arguably construing or applying the contract and acting within the scope of his authority. . . ."

> Therefore, the fact that we might be "convinced he committed serious error does not suffice to overturn his decision. . . ." [Pet. App. 122a, citations omitted; emphasis in original]

REASONS FOR GRANTING WRIT

The decisions below hold that where a collective bargaining agreement requires "cause" for discharge and also defines "dischargeable" conduct, arbitrators are *required* to interpret the agreement as granting the employer an unfettered and unreviewable discretion to decide whether to discharge an employee committing a "dischargeable offense." That proposition has generated a square and irreconcilable 4 circuit to 3 circuit conflict among the courts of appeals which have confronted the question. Because provisions defining certain acts as cause for discharge are quite common in collective bargaining agreements,[2] and because collective bargaining agreements are quite commonly national agreements in force throughout the country rather than wholly within the confines of a particular court of appeals, the disagreement among the circuits as to the legal effect to be given such provisions is, in and of itself, of great practical importance to the development of the law of labor contracts, and in and of itself, calls for review by this Court.

But this case is not "merely" about this deep division on how to read a particular, prevalent provision in collective bargaining agreements; the conflict among the circuits on that question reflects what Judge Reinhardt recently has termed "the continuing conflict in the courts over arbitration awards." Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over*, 40 Proceedings of the Annual Meeting of the National Academy of Arbitrators 25, 34 (1987). This Court set forth the basic rules governing judicial review almost three decades ago

---

[2] *See* Bureau of National Affairs, *Basic Patterns in Union Contracts* 7 (11th ed. 1986) ("Specific grounds for discharge are found in 74% of contracts in the [BNA] database").

in the *Steelworkers Trilogy*,[3] but reecnt decisions, such as those at issue here, make "clear that there are two fundamentally different approaches to the question of judicial oversight of the arbitration process," Reinhardt, *supra*, at 36, and in particular with respect to whether an award which goes "beyond the 'express language of the contract' " is entitled to be enforced, *id.* at 32. That conflict so threatens the vitals of the labor arbitration system as to demand resolution by this Court.[4]

A. Most collective bargaining agreements contain a provision in which the employer agrees not to discharge an employee unless the employee engages in conduct ("cause") which makes the penalty of discharge fair and appropriate ("just" or "proper").[5] Such provisions are understood by arbitrators to "constitute[] a broad charter of responsibility to work out a principled jurisprudence in light of the moral admonition expressed . . . to see that the cause for discipline is just." Kadish, *The Criminal Law and Industrial Discipline As Sanctioning Systems*, 17 Proceedings of the National Academy of Arbitrators 125, 147 (1964). The "real problem" in most discharge cases is deciding "whether [there] was sufficient cause" for discharge. *Id.* at 149 (remarks of Professor Ross).

Not infrequently, that problem is complicated by the existence of plant rules defining dischargeable offenses. Such rules are sometimes jointly agreed to in bargaining and other times are promulgated by the employer pur-

---

[3] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

[4] *See also Comment*, 18 Wake Forest L. Rev. 902, 912 (1982) ("Both courts and commentators are divided as to whether past practices should be considered when they directly contradict the plain unambiguous language of the collective bargaining agreement").

[5] *See* BNA, *supra* n.2, at 7 ("just cause" required in 88% of collective bargaining agreements in BNA database).

suant to a rule-making authority left to the employer by virtue of the agreement.

Where an employer defends a discharge on the basis of rules which were unilaterally introduced "the union may normally challenge the [rules'] reasonableness and the penalties that may be prescribed for their violation." *Georgia Kraft Co.*, 71 Lab. Arb. 222, 226 (1978). Where, on the other hand, a discharge is predicated on "company rules . . . included as part of a collective bargaining agreement . . . the arbitral inquiry will normally focus upon whether the facts support a finding that the rule was in fact violated *and whether the rule was fairly and reasonably applied in the particular case*. . . . [T]he union can challenge the reasonableness of the rule's application in order to insure that an otherwise legitimate rule has not been applied in an unfair, arbitrary, or discriminatory manner." *Id.* at 226-27 (emphasis added.[6] This is precisely the test the Arbitrators applied in the instant case. *See* pp. 4-6 *supra*.

The principle that the "application" of agreed-upon disciplinary rules is subject to challenge and that a discharge may be overturned if such a rule were applied in an "unfair" or "arbitrary" manner in a particular case, while well-accepted among labor arbitrators, has generated considerable controversy in the courts of appeals. *Seven circuits* (including the First Circuit in the instant case) have confronted the question of whether such an arbitration award "draws its essence from the collective bargaining agreement," *Enterprise Corp.*, 363 U.S. at 597, and thus is entitled to be enforced. The courts have divided 4-3 in their answer to that question.

In concluding that the Gwiazda award is not enforceable, the First Circuit in *Warren I* relied on the Sixth

---

[6] *See also* W. Baer, *Discipline and Discharge Under The Labor Agreement* 14-16 (1972); Wollett, *What An Arbitrator Looks For From Management in Discharge Cases*, 9 Emp. Rel. L.J. 525, 527-29 (1984).

Circuit's decision in *Firemen and Oilers Local 935-B v. Nestle Co.*, 630 F.2d 474 (6th Cir. 1980). That case involved a collective bargaining agreement which provided that certain specified offenses (including "incompetency, insubordination, or failure to perform satisfactorily"), "shall constitute cause for the dismissal of any employee from the service of the company." *Id.* at 475. The arbitrator there found that, while the grievant had refused direct orders from his foreman, the grievant was not guilty of all of the offenses charged by the employer and in light of the grievant's long seniority, the arbitrator held that discharge was too severe a penalty. The Sixth Circuit vacated the award. That court concluded that the agreement "is clear and unambiguous" and "*needs no interpretation*" and that under the (supposedly) plain meaning of the contract the arbitrator was not empowered "to decide that discharge is too severe a penalty for the insubordination which he found." *Id.* at 476-77 (emphasis in original). *See also Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board*, 724 F.2d 1217 (6th Cir. 1984); *Autoworkers Local 342 v. TRW, Inc.*, 402 F.2d 727 (6th Cir. 1968).[7]

In *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977), which the court below also cited approvingly, Pet. App. 25a, the Tenth Circuit reached a similar conclusion. The agreement in question there provided that the employer's driver-salesmen "may be discharged for just cause, among which just causes are the following: . . . (G) failure to settle bills and funds collected for the Company within twenty-four (24) hours." *Id.* at 693-94. Based on that rule the employer fired an employee who had accepted a check in payment for a delivery and, as a consequence, had taken

[7] Indeed, even though the arbitrator in *Nestle Co.* made no "specific findings" that the grievant's conduct constituted "insubordination" within the meaning of the collective bargaining agreement, the Sixth Circuit concluded that the grievant's conduct "constituted insubordination as a matter of law," relying on the defini-

seven days to "settle . . . funds collected for the Company." The arbitrator ruled that while the employee had violated the rule, discharge was an excessive penalty. The Tenth Circuit vacated the award stating, "We find no ambiguity in the use of 'may' [be discharged] rather than 'will.' The provision gives the employer the option to discharge or not. The employer exercised the option and discharged [grievant]." *Id.* at 695.

In stark contrast to the decisions of the First, Sixth and Tenth Circuits, the Third, Fifth, Seventh and Eighth Circuits have held that federal courts may not overturn arbitration awards of the type involved here. For example, in *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3rd Cir. 1982), the collective bargaining agreement contained a "just cause" provision and a provision stating that employees "absent from work without good and sufficient cause shall be subject to discharge." The arbitrator overturned the discharge in a case in which the facts found by the arbitrator suggested that the grievant had been so absent. The Third Circuit enforced that award, explaining that even if the grievant had been absent for four days without "good and sufficient" cause, the arbitrator was free to conclude that the "shall be subject to discharge . . . clause was nonmandatory . . . and that consequently the contract authorized [the arbitrator] to apply all the surrounding facts and circumstances to his interpretation of the contract to determine whether or not discharge is proper." *Id.* at 756. The court of appeals reasoned:

---

tion of that term provided by *Black's Law Dictionary*. 630 F.2d at 477.

Similarly, in its opinion in *Warren I*, the First Circuit relied upon a digest summary of collective bargaining agreements to hold the terms "proper cause" and "cause" to be synonymous as a matter of law, and thus to conclude that a violation of Rule 7 established "proper cause" for discharge.

> Such an interpretation would certainly not manifestly disregard the language of the agreement or lack support from principles of contract construction. The arbitrator's award may represent an implicit resolution of an inherent tension between [the two provisions]. Certainly it was his obligation to resolve any conflicts in construction. [*Id.*]

Similarly, in *F.W. Woolworth Co. v. Miscellaneous Warehousemen*, 629 F.2d 1204 (7th Cir. 1980), the Seventh Circuit enforced an arbitration award which overturned a discharge of several employees whom the arbitrator found had committed "technical violations" of a company rule by calling their employer on the first day of an illness but not on each subsequent day of their absence from work. The collective bargaining agrement in that case required just cause for discharge and provided that "[v]iolation of any Company rule shall be considered just cause." Like the Third Circuit, the Seventh Circuit upheld the arbitrator's conclusion that the contract did not mean that every "dischargeable offense" necessarily provides just cause for discharge. The Seventh Circuit explained:

> We conclude that the arbitration award in the instant case "drew its essence" from the parties' agreement, viewed in the light of its language, the surrounding circumstances, and the "law of the shop." The provisions at issue were somewhat contradictory so it was appropriate for the arbitrator to interpret them and resolve the ambiguity. His interpretation was rational so it should not have been rejected by the district court. [*Id.* at 1216.]

See also the Fifth Circuit's decision in *Waverly Mineral Products Co. v. Steelworkers*, 633 F.2d 682 (5th Cir. 1980) and the Eighth Circuit's decision in *Kewanee Machinery v. Teamsters Local 21*, 593 F.2d 314 (8th Cir. 1979).[8]

---

[8] In *Norfolk Shipbuilding & Drydock v. Boilermakers Local 684*, 671 F.2d 797 (4th Cir. 1982), the Fourth Circuit staked out an

In reaching its decision in *Warren I*, the First Circuit expressly followed the decisions of the Sixth and Tenth Circuits in *Nestle* and *Mistletoe Express Service*, while implicitly rejecting the contrary approach taken by the Third, Fifth, Seventh and Eighth Circuits. Had this case arisen in the latter circuits, the award clearly would have been enforced as the courts in those circuits would have viewed it as within the arbitrator's province to harmonize the "proper cause" provision of the contract here with the Mill Rule defining dischargeable offenses, and thus would not have interfered with the arbitrator's resolution of that issue.

B. The conflict among the circuits just noted reflects, to quote Judge Reinhardt again, "two fundamentally different approaches to the question of judicial oversight of the arbitration process. P. 11, *supra*.

The decisions below in the instant case are, as Judge Reinhardt has observed, "illustrative of the current trend toward emphasizing contract principles and utilizing the 'express language rule.'" Reinhardt, *supra*, at 35. That rule posits first, that if the language of a contract is "plain" the contract must be read literally without regard to bargaining history, past practice, industry custom or the like; and second, that the question of whether contract language has a single plain meaning is a *question of law* which the courts are to resolve in *de novo*. The "two most important articulations of the express language rule," as Judge Reinhardt has observed, "are found in a Sixth Circuit case [*Detroit Coil v. Machinists*,

---

intermediate position on the issue posed here. There the arbitrator overturned a discharge in the face of a contract which permitted the employer to discharge "for cause" and stated that "violation of Company rules . . . shall be considered just cause for discharge." The district court overturned the arbitral award but the court of appeals reversed, holding that the Union was entitled to prove that "there was a[] custom or practice in the plant which had been integrated into the contract giving the arbitrator authority to modify the penalty imposed by [the employer]." 671 F.2d at 800.

supra] and a Tenth Circuit case [*Mistletoe Express Serv. v. Motor Expressmen, supra*]" on both of which the court below relied. Reinhardt, *supra*, at 33. "When either is cited in an opinion, one can be almost certain that the award is being overturned." *Id.*

That the First Circuit in the decisions below embraced the "express language" rule is clear from the reasoning of those decisions. That court stated (in words borrowed from the Sixth Circuit's opinion in *Detroit Coil*) that the arbitrator's duty is only to " 'construe ambiguous contract language,' " and that the court's task is to "examine the award and the judgment below in the light of the contract to see if the contract was ambiguous." P. 7 *supra*. By its terms, that formulation precludes an arbitrator from relying on extrinsic evidence of the parties' intent whenever the contract language is, in the court's view, "plain." Indeed, the court below felt free to set aside the Arbitrator's interpretation of the contract without even acknowledging the Arbitrator's reliance on the company's manual and the parties' past practice because that court "disagree[d]" with the arbitrator's conclusion that the contractual language is "ambiguous."

Perhaps the clearest demonstration of how far the courts which have developed the "express language" rule are prepared to go in overturning arbitral awards is the recent decision by the Sixth Circuit in *Dobbs Inc. v. Local 614, International Brotherhood of Teamsters*, 813 F.2d 85 (6th Cir. 1987). In *Dobbs*, the Sixth Circuit made explicit the implications of its earlier decisions—upon which the court below relied—by holding that an arbitration award *fails* to draw its essence from the contract whenever:

> (1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from

> the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement . . . [*Id.* at 86 (citation omitted).]

Under this approach, past practice, bargaining history, and all other indicia of the intent of the contracting parties become irrelevant if the *court* determines that the arbitrator's award is at odds with the "precise terms" of the agreement, or concludes that the arbitrator has found an implied agreement not "expressly provided" in the contract's written language.

In contrast, the courts of appeals on the opposite side of the question presented here have rejected the express language rule and articulated a very different understanding of both the arbitral role in interpreting labor agreements and the judicial role in reviewing arbitral decisions. Those courts hold that arbitrators are entitled to rely on "context and any other indicia of the parties' intention," *Arco-Polymers*, 671 F.2d at 753, and are *not* duty bound to give a dryly literal reading to the contract's words. Thus, for example, the Seventh Circuit—whose decision in *F. W. Woolworth* is, as we have seen, in square conflict with the decision below in the instant case—has ruled that "contracts have implied as well as express terms and the authority of an arbitrator to interpret a collective bargaining contract includes the power to discover such terms." *Ethyl Corp. v. Steelworkers*, 768 F.2d 180, 186 (7th Cir. 1985). The court in *Ethyl Corp.* went on to observe:

> [D]espite contrary intimations in [the Sixth Circuit's] decision in *Sears Roebuck & Co. v. Teamsters Local 243*, 683 F.2d 154, 156 (6th Cir. 1982), there is no rule that an arbitrator in order to find an implied condition, must first find the language of the contract to be ambiguous. Although a literal reading of the contract in this case would preclude the

implied condition the arbitrator found, he was not obligated to read the contract literally. [*Id.*] [9]

C. In our view, it is only these latter decisions—and not decisions such as the First Circuit's in these cases—which are faithful to the lessons of the *Steelworkers Trilogy*, as elaborated upon more recently in *Paperworkers v. Misco, supra.*

1. The *Trilogy* teaches that "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Warrior & Gulf*, 363 U.S. at 581-82.[10] More fundamentally, the *Trilogy* recognizes that when the parties provide for arbitration in a collective bargaining agreement, "[i]t is the arbitrator's construction which was bargained for" and hence "the question of interpretation is a question for the arbitrator." *Enterprise Corp.*, 363 U.S. at 599. And under the *Trilogy*, although a court is empowered to assure that the arbitrator does not simply "dispense his own brand of industrial justice" but instead renders an award which "draws its essence from

---

[9] *See also Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1278-80 (11th Cir. 1982) (the "arbitrator is not limited to the bare words of the agreement and common law rules for the interpretation of private contracts"; the "arbitrator does not violate his duty to draw the essence of his award from the letter or purpose of the collective bargaining agreement when he relies upon any of several aids to construe the intent of the parties in addition to the express terms of the contract").

[10] *See also* Justice Brennan's concurring opinion in the *Trilogy*, 363 U.S. at 570: the meaning of the labor agreement "is not to be found simply by reference to the dictionary definitions of the words the parties use . . . Words in a collective bargaining agreement, rightly viewed by the Court to be that charter instrument of a system of industrial self-government . . . are to be understood only be reference to the background which gave rise to their inclusion."

the collective bargaining agreement," a court has "no business overruling [the arbitrator] because their interpretation of the contract is different from his." *Id.* at 596-97. Rather,

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. [*Id.* at 596]

Any doubt as to the meaning of the *Trilogy* with respect to the scope of judicial authority to enforce a court's understanding of the "express language" of a collective bargaining agreement should have been laid to rest, we believe, by this Court's decision in *Misco.* The Court there reaffirmed the basic teaching of *Enterprise Corp.*:

> The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract . . .
>
> * * * *
>
> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of local courts. To resolve disputes about the application of a collective bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread

> the contract . . . So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect . . . [56 L.W. at 4014].

And the *Misco* Court elaborated on the practical meaning of the "essence" test of *Enterprise Corp.* by explaining:

> [A]s long as the arbitrator is even *arguably* construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed *serious* error does not suffice to overturn his decision. [56 L.W. at 4014; emphasis added.]

Indeed, with respect to the specific issue raised here, in *Misco* the Court squarely held that it is for arbitrators, and not courts, to decide if a contract precludes arbitral review of whether the penalty of discharge is just or proper for a particular type of offense. The *Misco* Court noted that while "[n]ormally, an arbitrator is authorized to disagree with the sanction imposed for employee conduct . . . [t]he parties . . . may limit the discretion of the arbitrator in this respect," and the Court acknowledged the force of the Company's contention that "under the contract involved here, it was within the unreviewable discretion of management to discharge an employee once a violation of Rule II.1 was found." *Id.* 4015.[11] But

---

[11] Like Rule 7(a) in this case, Rule II.1 in *Misco* provided that possessing or using drugs on plant premises constituted a "cause[] for discharge."

The court below suggested that this case might be distinguishable from *Misco* on the ground that the contract here "more clearly reserves the power to discharge one who violates [a] Company rule" because under this contract the "Company reserves the sole right to . . . discharge employees for proper cause." Pet. App. 109a, 110a-1a; *see also id.* at 6a. But contrary to the lower court's speculation, the collective bargaining agreement in *Misco* in fact provided that

> the Company reserves and retains, *solely and exclusively*, all its inherent rights to manage the business as such rights

the *Misco* Court observed that the arbitrator's opinion suggested a different interpretation of the contract as the arbitrator "cryptically observed that Rule II.1 merely listed causes for discharge and did not expressly provide for immediate discharge." *Id.*[12] And the Court concluded that it was *not* for the appellate court to "dispos[e] of this case on the ground that Rule II.1 had been violated and discharge was therefore proper"; rather, if that issue were determinative and if the arbitrator's award were unclear in this regard, "*the proper course would have been remand to the arbitrator for a definitive construc-*

> existed prior to the execution of this Agreement. . . . [T]he management rights not abridged by this Agreement include, but are not confined to, the right to . . . reprimand, *discharge* or otherwise discipline employees. [Petition for Certiorari in No. 86-651 at 27a-28a; emphasis added.]

The *Misco* contract further provided that

> The Company shall retain the right to establish, maintain, enforce, rescind, amend or change rules and regulations relating to the discipline or discharge of employees and the procedures for issuance of reprimands and other forms of discipline. The Union may challenge any plant rule within fifteen (15) days after . . . posting . . . [*Id.* at 30a.]

Thus, if anything, the contract in *Misco* more clearly preserved management's authority over discharges than does the contract involved in this case.

[12] The Arbitrator in *Misco* had stated:

> [I]t should be pointed out by the Arbitration that Section II of the Company Rules does not say anything about immediate discharge. Section II only lists "causes for discharge." As an example, reading on duty except where required in line of duty is listed under Section II. Is this a cause for immediate discharge? It is difficult for this Arbitrator to see where both reading on duty and being involved with marijuana in the manner Grievant is charged have equal weight for immediate discharge. [*Id.* 45a]

The Arbitrator in *Misco* did not pursue the point further presumably because he found the grievant was not guilty of the offense charged.

tion of the contract in this respect." Id. (emphasis added.)

2. Given the foregoing we would have thought, as Chief Judge Coffin concluded, pp. 9-10 *supra*, that *Misco* indisputably requires that the Arbitrators' decisions in this case be sustained. But the decisions below, and the Sixth Circuit's recent decision in *United Inter-Mountain Telephone Co. v. Communications Workers*, No. 87-5701 (6th Cir., April 25, 1988),[13] reveal that there is still confusion as to the appropriate scope of judicial review of arbitral awards.

In particular, in *Warren II* the court below relied on *Misco*'s statement that "[t]he arbitrator may not ignore the plain language of the agreement," Pet. App. 10a, *quoting*, 56 L.W. at 4014, and elevated that observation —which on its face means only that an arbitrator should *start* from an agreement's plain language—into a requirement that arbitrators are to give a *literal* reading to all "plain" terms of a collective bargaining agreement, and that a court is free to overturn an award if the court arrives at a different understanding than the arbitrator of the "plain language." *See* p. 17 *supra*. On that basis, the *Warren II* court concluded that "it cannot be said that the arbitrator even 'arguably constru[ed] or appl[ied] the contract," Pet. App. 11a, even though the arbitrator's award demonstrated conclusively that the arbitrator had gone to great pains to do precisely that, albeit with a different result than the court below desired in its judicial wisdom.[14]

[13] The Communications Workers are filing contemporaneously with this petition, a petition for a writ of certiorari in *United Inter-Mountain*. Counsel for the Union in this case have collaborated with union counsel in *United Inter-Mountain* in preparing the petition in that case, and we incorporate here the arguments made therein. A copy of the petition in *United Inter-Mountain* is being served on counsel for respondent in this case along with the instant petition.

[14] In *Warren III*, the court of appeals attempted to buttress *Warren II*'s reading of *Misco* as follows:

By reading *Misco* to vindicate the "clear-language" rule, the decisions below threaten further mischief to the arbitral system. For that reason, too, the decisions below either should be overturned summarily or else subject to plenary consideration by the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK BROOKS
(Counsel of Record)
UNITED PAPERWORKERS
INTERNATIONAL UNION
P.O. Box 1475
Nashville, TN 37202
(615) 834-8590

LAURENCE GOLD
DAVID SILBERMAN
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
STEPHEN P. SUNENBLICK
P.O. Box 7060, DTS
97 India Street
Portland, ME 04112

JAMES COPPESS
1925 K Street, N.W.
Suite 411
Washington, D.C. 20006

> The Supreme Court specifically said in *Misco* that its result might have been different had the issue before it there been the same as the issue before us here, namely, whether the contract gives to the Company the *sole right* to discharge one who violates a particular Company rule. [Pet. App. 110a]

To support this reading the *Warren III* panel quoted from *Misco* the sentences in which this Court noted that *"it may be,* as the company argues, that under the contract involved [in *Misco*], it was within the unreviewable discretion of management to discharge an employee *once a violation of Rule II.1 was found." Id.* (emphasis added by the court of appeals). Remarkably, however, the *Warren III* panel ended that quotation with ellipses, thereby omitting this Court's final sentence which made clear that it was for the *arbitrator* to render a *"definitive construction"* as to whether discharge falls within the "unreviewable discretion of management." 56 L.W. at 5015 (emphasis added). Here, of course, the Arbitrator dealt with that question at length and in detail and concluded that the agreement does not grant such a discretion.